

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1084

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

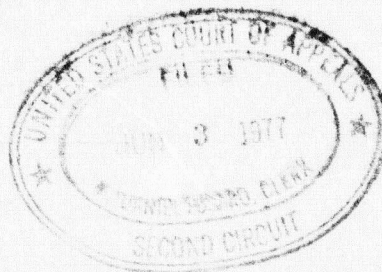
RAFAEL CUADROS,

Defendant-Appellant.

Docket No: 77-1084

**B
P/s**

APPELLANT'S BRIEF



FREDRIC LEWIS
Attorney for Appellant
30 Vesey Street, 11th Floor
New York, New York 10007
(212) 349-7300

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

RAPHAEL CUADROS,

Defendant-Appellant.

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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

RAPHAEL CUADROS, appeals from a judgment of conviction entered on January 20, 1977 in the United States District Court for the Southern District of New York after a jury trial before the Honorable Irving Ben Cooper.

Indictment 75 Cr 1254 charged the defendant with conspiracy to violate narcotics laws under Title 21, United States Code, Section 846 (Count One) and with distribution of cocaine and possession of cocaine with intent to distribute cocaine in violation of Title 21, Sections 812, 841(a)(1) and 841(b)(1)(A) of the United States Code. The indictment was filed December 23, 1975. A superseding indictment was filed August 26, 1975 under the same number.

A pre-trial suppression hearing was held in the Southern District before the Honorable Irving Ben Cooper on December 6, 1976 to determine whether probable cause existed to arrest defendant.

Defendant's trial commenced December 7, 1976, and concluded December 13, 1976 when the jury found the defendant, not guilty as to Count One (conspiracy) and guilty as to Count Two (possession).

January 20, 1977 Honorable Irving Ben Cooper sentenced defendant to four (4) years imprisonment. The defendant was remanded.

ISSUES

1. Was there sufficient independent non-hearsay evidence of defendant's participation in the conspiracy to justify admission of hearsay testimony under the co-conspirator exception to the hearsay exclusion?
2. Was there sufficient evidence of possession of contraband by defendant?
3. In view of the fact that defendant was not charged with possession of a revolver, was its probative value outweighed by its prejudicial and inflammatory effect, so as to render its admission error?
4. Was defendant deprived of his right to confront his accuser because of the hearsay statements admitted against him?

FACTS

Defendant was charged with conspiracy to violate the narcotics laws and with distribution as well as possession, with intent to sell controlled substances (C-1, C-2). *

Edward J. Kelley, a special agent of the Drug Enforcement Administration (DEA) testified that on December 16, 1975 he was advised by Group Supervisor Hall and Agent Gray that a narcotics transaction would take place in the evening, involving a pound of cocaine (T141). At about 7:15 that evening, Agent Kelley, Group Supervisor Hall and Agent Smith went to the apartment of an informant, one Robert Lubash, located at 300 East 74th Street, Manhattan, on the southeast corner of 74th Street and Second Avenue (T141-142, 146). The apartment number was 26-F(T141).

At 7:38 P.M. the telephone in the Lubash apartment rang and Mr. Lubash answered the call (T143). After putting the telephone on hold, Mr. Lubash informed the agents that the caller was a Mr. Prikas(T144). This conversation was recorded by Special Agent Smith with the consent of the informant (T144).

* References to the minutes of the pre-trial hearing shall be noted as P.T.H. followed by the page number. References to the minutes of the trial shall be noted as T followed by the page number.

After the call had been recorded, Agents Hall and Smith left the apartment, Agent Kelley remaining there (T146). At about 8:40 P.M., Mr. Prikas arrived at the apartment, accompanied by a Mr. Valdes (T146). Agent Kelley was introduced to Prikas and Valdes by Lubash (T146-147).

Prikas was carrying a white plastic shopping bag issued by Regal Shoes (T147). The group went into the television room and sat down around a large table (T147-148). Prikas gave the plastic Regal shoe bag to Lubash who removed a number of shirts, wrapped in plastic, and finally removed a large clear plastic bag containing white powder, placing the latter bag on the table (T148).

The clear plastic bag containing the white powder had been wrapped inside a brown paper bag which camouflaged it (T171). The brown paper bag was at the bottom of the Regal Shoe bag which was opaque (T171). The shirts were on top of the brown paper bag so as to further camouflage it (T171). It was impossible to ascertain what was in the bag merely by looking at it (T171).

After the white powder had been placed on the table, Agent Kelley left the room twice to make telephone calls

in an adjacent room (T148-149). In the course of one of these conversations, he pretended to ask for one George, the imaginary money man in the transaction (T151). Defendant stipulated that the white powder was cocaine (T242).

When Agent Kelley returned to the television room, Lubash was taking a quantity of cocaine out of the larger package (T152). After making some tests, Mr. Lubash stated he didn't think the cocaine was too good (T152). Agent Kelley again left the television room and called Drug Enforcement Agency (DEA) base pretending to speak to the wife of the money man (T153).

When Kelley returned, Lubash performed another test on the cocaine and again spoke negatively of the reaction he was getting (T155).

At about 9:00 P.M. Agent Kelley received a telephone call from Group Supervisor Hall (T157-158). In the background he heard Lubash saying he wasn't satisfied with the cocaine (T158).

When he returned to the table, Kelley helped Lubash scrape the cocaine back into the original package (T159). After the cocaine had been put into the bag, Valdes placed the shirts back in the bag (T159).

After Prikas and Valdes departed, Kelley called DEA base (T159). He then removed a hidden portable radio and took it out to the balcony where he could see 74th Street (T159). From the balcony he saw Valdes walking from the south side to the north side of 74th Street (T160). Valdes walked easterly to a dark vehicle with the white Regal shopping bag and entered from the driver's side(T161). The vehicle left the place where it was parked and when it reached a point further down the block, it was stopped by other cars (T161).

Agent Kelley conceded on cross examination that as of December 16,1975 he did not know of the existence of defendant and that defendant's name was not mentioned on December 16, 1975 during the time Kelley was in the apartment with Valdes and Prikas (T180).

Prikas testified for the prosecution (T16). Prikas had been arrested on the charges involved in this case on March 18, 1976 (T168). He was indicted in the Southern District and charged with conspiracy to sell cocaine and possession of cocaine (T18). He pleaded guilty to a charge of conspiracy on October 20,before Honorable Irving Ben Cooper,

the trial judge in the case at bar(T19). He stated that the second count, possession, had been dropped, but that no commitments or promises had been made as to sentencing for count one (T19-20). An agreement in writing between Prikas and the United States Government to this effect was introduced in evidence as Government's exhibit 3 (T21-22). Mr. Prikas conceded on cross examination that he was testifying in order to repay the government for dropping one of the charges against him (T71).

Prikas testified that he knew Jaime Valdes and had known him for seven or eight years (T23-24). Although Prikas stated he had known defendant three years and pointed him out in the Courtroom (T24), he had had no social relationship with Mr. Cuadros, had met him only once or twice over the period he claimed to have known him, and knew the defendant only through Jaime Valdes, the defendant's brother in law (T76).

Prikas testified that he and Valdes worked at Bulova Watch Company, where Valdes was a toolmaker and Prikas was a tool and diemaker (T25). The conspiracy to sell cocaine arose according to Prikas on November 7, 1975 at the

annual toolmaker's dinner given by Bulova (T25-28). During the course of the dinner, Valdes stated that he needed money to go to Colombia to see his wife who had separated from him and taken their two children with her (T29-30). Valdes said he had cocaine to sell and asked Prikas to obtain the telephone number of a person who would be willing to buy it (T30). The person whose number Valdes sought was Robert Lubash, whom Prikas and Valdes knew to be a stockbroker who also sold drugs (T31-32).

Mr. Prikas testified that about a week after the dinner he obtained the phone number of Lubash through a friend named Al Siefert (T33-34). Prikas testified over a continuing objection by defense counsel that Valdes told him he would have to obtain the necessary sample to show Lubash from his brother in law Rafael (T35-36). Prikas stated that subsequently in late November, Valdes informed him he had obtained a sample to show Lubash (T37). According to Prikas, Valdes informed him that Valdes, Prikas and Cuadros would each receive \$2,000. for his part in the transaction (T38).

Prikas testified that following this conversation, he telephoned Lubash early in December and arranged

to meet (T38-39). Prikas stated that Lubash agreed and a time was arranged (T39). Prikas said he informed Valdes about this (T39). According to Prikas, he and Valdes went to the Lubash apartment at the appointed time, on approximately December 8, 1975 (T39-40). It was the testimony of Prikas that they went by car and no one was with them (T40,42). After parking the car, according to Prikas, the two men went to the Lubash apartment (T43). Prikas stated that other than Lubash, Valdes and himself, no one was present (T45).

Prikas stated that Valdes took out a small package which Lubash opened and tested in various ways (T45-46). According to Prikas, Lubash, although interested, wanted to see another sample from the same block (T46). Prikas testified that Valdes in answer to an inquiry from Lubash, said a pound of cocaine was available (T46).

Prikas testified that a day or two later he had another conversation with Valdes, who allegedly told him that Cuadros was unhappy about supplying another sample (T47-48). Defense counsel repeated the same objection as previously (T47-48). The objection, as before, was overruled (T48).

Prikas stated that a few days later another conversation took place with Valdes at which time the latter

informed him another sample was available and asked him to call Lubash (T48-49). Prikas said he called Lubash three times that day, December 16, 1975 (T49). The third of these conversations was tape recorded and without objection by defense counsel, the tape recording and a transcription of it were received into evidence as Government Exhibits 4 and 4-A (T53-54). Defense counsel conceded that exhibit 4-A was a true transcription of the tape.(T55).

Prikas testified that at about 7:30, right after he had called Lubash, he called Valdes, told him Lubash had the money and arranged to meet and go to Lubash's apartment (T56-57). According to Prikas, Valdes did not say anyone would accompany him (T57). It was Prikas' testimony that they arranged to meet at 48th Street and Queens Boulevard (T57).

Prikas testified that he arrived at the appointed meeting place before Valdes who later drove alongside the left side of his car (T58). According to Prikas he was surprised to see Mr. Cuadros in Valdes' car (T58). Prikas said that when he asked Valdes what Mr. Cuadros was doing in the car, Valdes replied that he was there for protection (T58). According

to Prikas, Mr. Cuadros was in the right front seat (T59-60).

Prikas testified that the trip ended at Lubash's house at 74th Street and Second Avenue, Prikas parking his vehicle in the garage of the building, and Valdes double parking his vehicle near the building entrance (T61). Prikas stated that as he stood near the building Valdes gave him the shopping bag and they then went to Lubash's apartment (T62). There they found another person present whom Lubash introduced as a friend of his (T63).

Prikas testified that Valdes removed the clothes which were in the shopping bag, hiding the cocaine (T63). The cocaine was in a plastic bag and Valdes placed it on a table (T63-64). According to Prikas, Lubash tested the cocaine and stated he was not interested (T64). Prikas said that Valdes replaced the cocaine in the shopping bag with the clothes on top (T64). They then left the apartment, Valdes carrying the shopping bag, according to Prikas (T65-66). Prikas said he then went to the garage under the building, obtained his car and went home (T67). Prikas testified that between December 16, 1975 and the time he subsequently left his position at Bulova, he did not see Valdes (T70). He also stated that he

had gone to Valdes' house since that date but had not seen him there (T70). Prikas said that Valdes was in Colombia(T70).

Prikas admitted that he had lied to Federal Agents to protect Al Siefert, his source for Lubash's telephone number (T72-73). He admitted that he had not spoken to Mr. Cuadros from the time the conspiracy began until the time he was arrested except for the occasion on December 16, 1975 when he asked what Mr. Cuadros was doing in Valdes' automobile (T74-75). Prikas agreed that Mr. Cuadros never went to Lubash's apartment with him, that Cuadros did not take part in any of the conversations Prikas had with Valdes and that he never saw Cuadros with any drugs (T75). Prikas admitted that the only basis for his assumption that Mr. Cuadros was involved was what Valdes had told him (T76).

Prikas signed a statement on March 19, 1976, the day after his arrest (T108-109). The Assistant United States Attorney stipulated that in that statement, there was no reference to Rafael Cuadros (T109).

Michael S. Gray testified on behalf of the government that he was a Special Agent of the Drug Enforcement Administration (T205). Agent Gray testified that on December 16, 1975 at about 7:00 P.M. he was involved in a

surveillance of the area of East 74th Street and Second Avenue (T205). He was in a car on the northwest corner facing south, a little north of East 74th Street (T206). Group Supervisor Hall was with him (T206). Gray was driving (T206).

Gray testified that he saw Prikas and Valdes enter the building at 300 East 74th Street, Prikas carrying a white plastic bag, at about 8:35 P.M. (T207). Gray testified that he recognized them because he had been given a description by Lubash (T207). At that time Lubash had been an informant for about five weeks (T208). According to Gray, Prikas and Valdes were in the building about thirty minutes (T209).

Gray stated that he saw defendant on the southeast corner, observing him for the first time about five to ten minutes after Prikas and Valdes had entered the building (T209-210). According to Gray defendant was looking around the area (T210). Gray stated that Mr. Cuadros was in the area about fifteen minutes (T210). Gray testified that there was a telephone booth in the vicinity of where defendant was standing and that he did not observe him make a telephone

call (T210). Gray did not see Mr.Cuadros leave the area (T211).

After receiving a communication from base radio, Gray saw Prikas and Valdes leave the building,Valdes carrying the white shopping bag (T212). At that time he did not see Mr.Cuadros (T212). Gray said he saw Prikas go into the underground parking garage, and Valdes walk east on 74th Street (T213).

Gray testified that he turned the corner in his car and observed Valdes entering a green Pontiac (T213). Gray continued driving the government car about fifty yards beyond where Valdes had entered the Pontiac(T213). Gray testified that as he was passing the green Pontiac, he observed Cuadros in the same car (T214). When Valdes pulled the Pontiac away from the curb, Gray moved his vehicle to block Valdes, at which time agents arrested Valdes and defendant (T214).

Gray testified that he reached into the car and pulled a white plastic bag from the footwell of the front passenger side of the Pontiac, after defendant and Valdes had been removed from the car (T214-216). Gray stated that

within the white plastic bag there was a brown paper bag and that within the latter bag was a white plastic bag containing white powder (T216). The bag containing the white powder was admitted into evidence as government Exhibit 1, over the objection of defense counsel, who based his objection on the ground that no connection had been shown between the bag containing the powder and Mr. Cuadros (T217-218). The trial court, apparently giving weight to the fact that the bag in which the clear plastic and the brown paper bag was contained was found in the area where Mr. Cuadros was seated, admitted the powder over counsel's objection (T217-218). Defense counsel stipulated with the government that the powder was cocaine, without conceding any connection with Mr. Cuadros (T242).

Gray testified that Valdes and defendant were taken to the Drug Enforcement Administration office in a government vehicle and that he drove the Pontiac there (T218-219). On the way, according to Gray, he looked into the center console (T219). At that point defense counsel objected and the jury was excused (T219).

The government sought to offer into evidence a revolver which was found by Agent Gray in the console of

Valdes' Pontiac (T220). Defense counsel objected that Mr. Cuadros was not charged with possession of the weapon, that his fingerprints were not found on the revolver, and that the prejudice in its admission outweighed any probative value it might have (T221). After a lengthy discussion in the absence of the jury, the Court reserved decision (T234-235).

Agent Gray testified that he found a plastic handbag in the console of the Pontiac (T243-244). Upon objection by defense counsel, the jury was again excused (T244).

Defense counsel objected on ground of surprise (T245-246). Defense counsel specifically pointed out that although he had served a demand for a bill of particulars a year previously, and that the bill of particulars served by the government indicated what property had been seized or taken at the time of defendant's arrest it made no reference to the plastic handbag (T245). Defense counsel then pointed out that he had only received a supplemental bill of particulars the previous Monday (December 6) when he returned from court (T245-246).

The Assistant United States Attorney disputed this point (T246). He argued that the original bill of particulars which had been supplied did not specify from whom the property had been taken and that it contained a statement that a description of property taken or seized from defendant would be furnished in a supplemental bill of particulars (T246). He further stated that the property had not originally been with the United States Attorney's office when the original bill of particulars was furnished (T247). He stated that he offered defense counsel after receiving the property, to let him come to his office and look at it (T247). According to the Assistant United States Attorney, this was done by telephone call in mid-November (T247-248). The Assistant United States Attorney said that defense counsel had responded by saying he would get back to him (T248-249).

Mr. Bentley, the Assistant United States Attorney stated that he had called defense counsel at 2:30 P.M., Friday, December 3rd, suggesting that he send a messenger to pick up the supplemental bill of particulars (T249-250). According to Mr. Bentley, defense counsel declined to accept it because of the delay (T250).

Defense counsel denied that Mr. Bentley had spoken to him about the matter in November and said that the first time the matter was mentioned was Friday, December 3(T253).

The Court accepted the statement of the government that Mr. Bentley had called Mr. Lewis in mid-November (T272). The Court then ruled in favor of the government on accepting Exhibit 6 (the pouch) into evidence, along with two documents contained therein(T273). The documents referred to were a New York City Department of Consumer Affairs license in the name of Rafael Cuadros and a receipt in his name from Strauss Stores(T267-268,273,281). The Court also ruled in favor of the government by permitting the revolver to be introduced into evidence (T274-279). The gun was admitted into evidence as government exhibit 7 (T286-287).

According to Agent Gray, the papers in the pouch were wedged down in the console and the gun was on top of them (T288). Agent Gray testified that the gun was loaded (T289).

In the shopping bag, in addition to the white powder, some shirts were found (T289-290). These were admitted into evidence as government Exhibit 8(T291).

Gray stated that he determined that the vehicle from which defendant and Valdes were arrested belonged to Valdes (T331-332). He stated that in his report of December 18,1975 he listed the gun which had been found in the console of the vehicle, but did not list the pouch or the documents found therein (T332-333). Agent Gray denied that he had found the pouch on the passenger seat(T335-336). He stated that although he had made approximately thirty arrests since December, 1975, and in every instance took property from the persons arrested, he could recall without notes to refresh his recollection, where he had taken the pouch from on the night of December 16,1975(T336,338). Gray although stating he also used Agent Kelley's report to refresh his recollection (T336-337), said that that report contained nothing about the pouch (T337). Gray nevertheless insisted he remembered exactly where he found the pouch (T338-339).

Although the weapon was submitted to the laboratory for fingerprints, those of Mr. Cuadros were not

found thereon (T339). He stated that he thought Mr. Cuadros in answer to his question had stated the weapon was not his (T340). Agent Gray stated that something could be placed between the seats of the car (T342).

Agent Gray said that after Prikas had been arrested in March, 1976, he interviewed Prikas who told them Mr. Cuadros' only source of income was the selling of cocaine (T362). He also said Prikas lied about the manner in which he learned of Lubash (T362-363). Agent Gray testified that to his knowledge Valdes was a fugitive who had jumped bail (T364).

Government Exhibit 10 in evidence was a laboratory test report which indicated that the latent prints developed on the revolver were insufficient in clarity and detail (T408-409).

At the close of the government's case, the government moved the admission of all testimony taken subject to connection (T436-437). Defense counsel opposed on the ground that there was no independent evidence which established that Mr. Cuadros was a participant in the conspiracy (T438). The Court ruled that the connection had been established (T440).

Sylvana Cuadros, the wife of defendant, testified that her parents had formerly been in the jewelry business (T453) and had had two jewelry stores (T454). She stated that her husband had worked for her parents part time for a time (T455-456). In addition, she stated that he had worked for Silvercup Bakery, Wonderbread Bakery and United Parcel Service (T456). She and her husband filed income tax returns (T456). The returns for 1972, 1973 and 1974 were introduced (T457-458,473). Mrs.Cuadros stated she had never seen a gun in the house (T458).

The defendant testified in his own behalf (T488). He stated that he was a permanent resident of the United States and was married and had a child(T488). Jaime Valdes is his brotherin law (T489). He stated that his brother Alberto was also a permanent resident of the United States (T490).

In 1975, Mr.Cuadros sold watches, rings and other jewelry (T491). He learned the jewelry business from his wife's parents (T492). He obtained jewelry from various places on Canal Street and the Bowery (T492-493). Receipts for jewelry defendant purchased were admitted in evidence

as defendant's Exhibit E (T494-496).

Prior to going into the jewelry business, defendant worked for Silvercup Bakery, United Parcel Service and Wonder Bread (T496).

A book showing purchases by defendant was marked Exhibit G and admitted in evidence (T499-500-502). An order book kept by defendant was marked Exhibit H and admitted into evidence (T503-505). Defendant's Exhibit I in evidence indicated to whom merchandise belonged (T506-507).

Defendant testified he saw Valdes one week prior to arrest (T508). They discussed a business Valdes had with defendant's brother, Alberto in Colombia (T509). Defendant stated that Valdes wanted to get out of the partnership with Alberto (T509). Defendant was interested in taking over that interest (T509-510).

Mr. Cuadros next saw Valdes the day he was arrested (T510). When he came home his wife told him Valdes had called (T510-511). He had been unable to sell Mr. Valdes' watches and after eating supper at home, he went to Valdes' house (T511-512). He also took Christmas cards and a briefcase (T513). He put the watches into the briefcase (T513). He reached Mr. Valdes' house at 7:55 or 8:00 giving him the watches and the Christmas cards (T513).

Mr. Cuadros wanted to talk to Valdes about his brother's business in Colombia, but Valdes was in a hurry to leave (T514-515). At Valdes' suggestion, defendant went with him (T514). Defendant went because Valdes was to leave for Colombia the next day (T514). He also wanted to have Valdes explain to Alberto Cuadros the reason he hadn't collected \$500.00 which was owed to Rafael and Alberto Cuadros by five or six persons (T515).

Mr. Cuadros testified he didn't notice a bag with Valdes when they left Queens (T516). He stated that Valdes didn't stop to talk to Prikas on the way to Manhattan (T518-519). Mr. Cuadros said he didn't see Prikas that night (T519).

When defendant entered the car with Valdes he had his portfolio with him (T519). He put it in the side of his seat near the console of the car (T519). Mr. Cuadros stated that he didn't open the console or look into it that night (T520). Defendant said he never owned a gun and didn't have one with him that night (T520). Defendant stated he did not know why Valdes was going to Manhattan (T520).

Mr. Cuadros stated that Valdes parked the car in mid block, informing defendant that he would not take long (T521). After remaining in the car 10 to 15 minutes, Mr. Cuadros got out to call his wife (T521-522). After making the call from a booth in mid block, across the street from the car, he returned to the car (T522).

Mr. Cuadros testified he didn't know where Valdes went when he left the car (T523). Valdes walked toward the rear of the car and defendant stated he didn't notice him carrying anything (T523-524). Defendant said that when Valdes returned he was carrying a bag (T524). Valdes had been gone twenty or thirty minutes (T524).

Mr. Cuadros stated that Valdes put this bag in the console but it bothered him with the shift (T525). He therefore put the bag on the floor on Cuadros' side (T525). Mr. Cuadros stated that Valdes didn't tell him what was in the bag, that he did not know what its contents were and that he didn't pay much attention to it (T526). When Valdes returned they left in the car, following which they were arrested (T527).

The following day Mr. Cuadros was taken to

the United States Attorney's Office and informed of the charges against him and Valdes (T529-530). He answered questions even though he was informed he didn't have to (T530). He testified that he told the United States Attorney he hadn't seen Valdes coming into the car with a bag because he didn't want to cause problems for his brother in law (T531).

Mr. Cuadros stated he had never been involved in a conspiracy to sell or distribute drugs, had never possessed narcotics with intent to sell or distribute and had never met or spoken to Lubash or Siefert (T533).

At the close of the government's case, the defense moved to dismiss the conspiracy count for failure to prove a prima facie case (T441). More specifically defense counsel pointed out that the government's case was grounded on hearsay statements and deprived defendant of his constitutional right to face his accuser (T441-442). Defense counsel also moved to dismiss the possession count for failure to prove a prima facie case, specifically pointing out that there had been no proof of possession (T442-443). These motions were renewed at the end of the entire case (T564-565).

In the course of the pre-trial suppression

hearing held December 6, 1976, defense counsel moved to suppress all conversations between Prikas and Valdes pertaining to Mr. Cuadros (PTH, 58-59). Defense counsel based this on the rule that declarations of a co-conspirator may not be admitted in evidence against a defendant unless there is independent evidence establishing defendant's participation in the conspiracy (PTH 59). The Court ruled against defendant (PTH, 61-63).

POINT ONE
THERE WAS INSUFFICIENT INDEPENDENT NON
HEARSAY EVIDENCE OF DEFENDANT'S PARTICI-
PATION IN THE CONSPIRACY TO RENDER THE
HEARSAY STATEMENTS OF PRIKAS ADMISSIBLE

The testimony of Prikas that Valdes had told him that Mr. Cuadros was the supplier of the cocaine was pure hearsay, having all the vices of such testimony. The testimony of Prikas that Valdes had told him that Cuadros accompanied him as protection on December 16, 1975 is equally defective.

In Weinstein's Commentary on the United States Rules of Evidence, he states the reason for the hearsay rule as arising out of the Anglo-American tradition which has evolved three conditions for testimony which encourage witnesses to try to be accurate and tend to expose inaccuracies in perception, memory or narration. These are the requirement that the testimony be under oath, that the witness be in the Courtroom and that the witness be subject to cross-examination. Weinstein's Evidence, Section 800(01) p.800-10. The author then states as follows (Section 800(01),p.800-11:

"If a witness testifies to a statement made by somebody else who perceived the event in question, these three ideal conditions are usually lacking. The trier is less likely to reach a correct conclusion with respect to credibility if he

cannot observe the declarant making his statement "under the stress of a judicial hearing when he is under oath, being observed by an adverse party, and subject to almost immediate searching cross-examination to test the various elements of his credibility." The danger against which the hearsay rule is directed is that evidence which is untested by these three conditions will be unreliable because faults in the perception memory and narration of the declarant will not be exposed."

These considerations apply with even more force in a criminal case such as the present one. Weinstein states (Section 800(03), p.800-17) as follows:

"In a criminal case, on the other hand, the hearsay rule enjoys a "special sacrosanctity," and is employed far more stringently "in spite of the repeated judicial protestations that civil and criminal trials are governed by the same rules of evidence." This is due to the greater danger of prejudice to a criminal defendant, and because of the operation of other factors affecting the admissibility of evidence such as the right of confrontation (see Sec. 800(04), *infra*) limitations on the use of extra-judicial statements of the accused imposed by the privilege against self-incrimination and the right to counsel, and rather limited discovery. Reversible error is found considerably more frequently in criminal cases where hearsay is improperly admitted against a defendant. See commentary to Rule 103, *supra*. Consequently, the trial judge's discretion to admit hearsay evidence against a criminal defendant is decidedly curtailed."

The purported declarations of Valdes, who jumped bail and was unavailable, entered the Courtroom through the mouth of Prikas. These declarations were admitted as statements by a co-conspirator pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence. This exception to the hearsay rule has been held to be subject to a number of conditions, one of which is that there must be evidence independent of the hearsay, establishing that defendant participated in the conspiracy before the hearsay declarations are admissible, against him. Weinstein's Evidence, Section 801(d)(2)(E)(01), p. 801-148.

In Glasser v. United States, 315 U.S. 60, (1942) this was stated forcefully as follows (pp. 74-75):

"However, such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. Minner v. United States, 57 F.2d 506; and see Nudd v. Burrows, 91 U.S. 426. Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence."

This Court has made similar determinations. United States v. Bentvena, 319 F.2d 916, 948-949 (2d Cir. 1963). United States v. Consolidated Laundries Corporation, 291 F.2d 563, 576 (2d Cir. 1961); United States v. Stromberg, 268 F.2d 256, 267 (2d Cir. 1959).

Such independent evidence of defendant's participation in the conspiracy must be substantial and not too slight. United States v. Bentvena, supra; United States vs. Consolidated Laundries Corporation, supra; United States v. Stromberg, supra.

Mere association with conspirators is insufficient for a finding of participation. United States v. Stromberg, supra; United States v. Bentvena, supra.

In the case at bar, there was no substantial evidence of defendant's participation in the conspiracy. His presence in Valdes' automobile was not evidence of participation. At most it was "mere association" with conspirators. The presence of the opaque plastic shopping bag in the footwell of Valdes' automobile is likewise no evidence of participation. The shopping bag contained shirts which covered the white powder at the bottom. The white powder in turn was enclosed in a brown paper bag. There is no evidence Cuadros knew of its contents.

That Mr. Cuadros was observed standing in front of the building at 300 East 74th Street is no evidence of participation in a conspiracy. It could have been attributed to his being anxious for Valdes to come out in order

that he could go home to Mrs. Cuadros who awaited him. Mr. Cuadros had testified that he called his wife from a phone booth in mid block after waiting in the car for ten or fifteen minutes (T521-522).

A revolver was found in the console of the vehicle. The vehicle however belonged to Valdes, not to Mr. Cuadros. There was no evidence Mr. Cuadros had owned the gun, or handled it. It is not corroboration of Prikas' statement that Valdes had informed him Cuadros was there for protection. If indeed that was Cuadros' function, nothing he did would indicate this. The cocaine which was to be sold for about \$18,000.00 was a valuable property for the conspirators. Cuadros, the alleged protector, sat in the automobile while Prikas and Valdes carried the valuable contraband into the building. When Cuadros allegedly stood in the front of the building, he was in no position to protect anything. There is no evidence he had the gun when he was in the street. His conduct was thus at variance with the role Prikas attributed to him in his hearsay testimony.

The Court charged the jury as to adoptive admissions by silence (T683-685). The reference was to the alleged silence of Cuadros when Valdes purportedly informed

Prikas that Cuadros was along for protection. The so called adoption admission however is based upon pure hearsay, since it depends upon believing that in fact Valdes, the unavailable declarant, did in fact make such a statement. Cuadros' purported silence is thus not evidence of participation.

The other possible piece of independent evidence of participation is the pouch containing Cuadros' identification which was found in the console, with the gun. The pouch was found by Special Agent Gray when he opened the console according to his testimony. In Gray's report of December 18, he listed the gun but did not list the pouch with Mr. Cuadros' identification. This is indeed strange and would tend to bear out Cuadros' testimony that he never opened the console, but put the pouch on the side of his seat near the console (T519-520). There was yet another strange aspect to this piece of evidence. Despite the fact that it was in the possession of the government since the arrest of Mr. Cuadros on December 18, 1975, defense counsel was not informed of this until a supplemental bill of particulars dated December 3, 1976 was received by defense counsel on December 6, 1976, on the eve of trial. Although it is true that the government claims that defense counsel

was informed of the intent to use this as evidence about the middle of November, 1976, defense counsel denied being informed of this at that time. Significantly, the Assistant United States Attorney in an affidavit dated December 23, 1976, after the trial had been concluded, conceded that he had no written note to substantiate his claim that he had informed defense counsel in November, although he insisted that this was his recollection (F-1) Since the Court accepted the representation of Mr. Bentley as to informing defense counsel in November, 1976 of the intent to use the pouch as evidence, we believe its admittance was highly prejudicial, especially when considered in the light of Agent Gray's omission to include the pouch in his report of December 18, 1975. This pouch admitted under such doubtful and prejudicial circumstances was the alleged evidence showing knowledge by Mr. Cuadros of the presence of the gun. Even if all of this evidence be conceded arguendo, it would merely establish that Mr. Cuadros knew of the presence of the gun and nothing more. This makes him, at worst, a spectator and not a participant. In accordance with the charge of the trial court, this would not be sufficient to convict defendant

of the crime of possession (T659-680).

We believe therefore, that the motion of the government to admit the hearsay testimony which had been taken subject to connection was improperly granted. We believe that defense counsel was correct in stating that no independent evidence connecting Cuadros as a participant in the conspiracy had been introduced. The evidence, while amply establishing that there was a conspiracy between Prikas and Valdes, did not establish participation by Cuadros. Under these circumstances, the motion of defense counsel at the close of the prosecution's case, to dismiss, should have been granted, as to both counts.

POINT TWO
THERE WAS INSUFFICIENT EVIDENCE OF POSSESSION
OR DISTRIBUTION TO SUSTAIN DEFENDANT'S
CONVICTION OF THIS CHARGE

Although possession of drugs may be constructive as well as actual, such constructive possession requires that the possessor knowingly have the power and the intention at a given time to exercise dominion and control over an object, directly or through others, United States v. Craig, 522 F.2d 29, 32 (6th Cir.1975); United States v. Di Novo, 523 F.2d 197, 201 (7th Cir.1975); United States v. Horton, 488 F.2d 374,381 (5th Cir.1974).

In United States v. Craig, supra, the Court of Appeals stated (p.31) that evidence against defendant consisting almost exclusively of his presence in a truck at the apartment of an informant, while his alleged co-conspirator or joint venturer carried a closed box containing drugs into the apartment, his flight and apprehension, and the presence of a shotgun in his car. The Court of Appeals held that this was insufficient to support a conviction for illegal possession of drugs, or aiding and abetting in their possession.

In United States v. Di Novo, *supra*, the Court of Appeals stated (p.201) that "mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found is insufficient to support a finding of possession." That Court held that a wife's presence as a passenger in her husband's automobile, both before and during the time it was involved in a police chase, which began at her husband's trailer home, could not be deemed an admission of possession of heroin which was subsequently found in the trailer. Her status as defendant's wife, and her possessory interest in the trailer were held not to support a finding of constructive possession. While the conviction of the husband was affirmed, that of the wife was reversed.

In United States v. Ferg, 504 F.2d 914 (5th Cir.1974), the Court of Appeals although holding that in reviewing the sufficiency of the evidence supporting a conviction of a crime, the evidence must be viewed in a light most favorable to the government (p. 916) also held that evidence that defendant had been a passenger in an automobile

in which marijuana was concealed and that he had been travelling with the person who admitted purchasing the marijuana was insufficient to sustain defendant's conviction of unlawful possession with intent to distribute.

In United States v. Castillo, 524 F.2d 286, 287-288 (10th Cir. 1975) the Court of Appeals held that evidence that defendant was employed by a business which transported persons and their personal effects, and was paid by the trip, that he was told to make a particular trip, that he reported at the office of his employer, finding passengers in the van, with a trailer attached to the van, that he was not involved in loading the van or its trailer, that the van and trailer were stopped at a border checkpoint in Oklahoma, that defendant opened the trailer on request of a government agent, resulting in a finding of a large amount of marijuana, was insufficient to show possession of the drug.

The evidence in the case at bar, which has already been discussed in the previous point, does not demonstrate actual possession, constructive possession or aiding and abetting, under the foregoing authorities. We do not believe that Cuadros' presence in the automobile of

his brother in law, his proximity to the cocaine in the vehicle, or even his leaving the car, either to make a telephone call, or to look for his brother in law or both, are sufficient to convict him of constructive possession. The presence of a gun in the car of Valdes may not be equated with possession of the gun by Cuadros. For the same reasons that we have given as to the insufficiency of the independent evidence to establish a conspiracy, we believe that there was insufficient evidence to support a conviction of possession. This conviction should therefore be reversed and the charge dismissed.

POINT THREE
THE PREJUDICE TO DEFENDANT WHICH RESULTED
FROM INTRODUCING THE GUN INTO EVIDENCE
OUTWEIGHED ANY PROBATIVE VALUE IT MAY HAVE HAD.

Although the trial court admitted the revolver into evidence, it admitted during the discussion which preceded the ruling that this was likely to create prejudice (T229). The trial court referred to the revolver as a formidable looking weapon (T230).

This Court has held that the trial judge, in determining whether evidence of crimes not charged in the indictment should be admitted, must determine whether the probative value of such evidence is outweighed by its prejudicial character. United States v. Deaton, 381 F.2d 114 (2d Cir. 1967). Where the probative value of such evidence may be very slight and its prejudice very strong, the trial judge has a duty in the exercise of discretion, to exclude it. United States v. Knohl, 379 F. 2d 427 (2d Cir.1967), cert.den. 389 U.S. 973.

In the case at bar, the revolver was found in an automobile belonging to Valdes with no evidence pointing to possession by defendant. At most, if the evidence is accepted in a light most favorable to the government, and

the inference of knowledge of its presence by defendant be conceded, arguendo, defendant was a knowing spectator to its presence and nothing more. The probative value of the weapon is slight indeed and it should therefore not have been admitted into evidence. In this posture, even if the conviction of defendant on Count Two (possession) is not reversed and the charge dismissed, a new trial is in any event warranted because of the prejudice in admission of the revolver.

POINT FOUR
IT WAS PREJUDICIAL ERROR REQUIRING REVERSAL
TO PERMIT PRIKAS TO TESTIFY TO EXTRAJUDICIAL
STATEMENTS OF VALDES WHICH WERE DAMAGING
TO DEFENDANT, IN VIOLATION OF HIS RIGHT TO
CONFRONT HIS ACCUSER.

Undoubtedly the most devastating testimony in the entire case were the two hearsay statements of Prikas that Valdes had informed him that defendant was the source of the cocaine, and that defendant was accompanying Valdes for protection. The statements, although uttered in the Courtroom by Prikas, were attributed to Valdes. Prikas had no personal knowledge of the facts to which he testified. Valdes who may or may not have made the statements in question, was a fugitive from justice and therefore not available to the cross examined.

These statements came within the prohibition of Bruton v. United States, 391 U.S. 123 (1968).

In the Bruton case, petitioner and his co-defendant were convicted of armed robbery after a joint trial. Although the co-defendant did not take the stand, a postal inspector testified that the co-defendant had orally confessed that he and petitioner had committed the robbery. The trial judge instructed the jury that although the co-defendant's confession was competent evidence against him, it was inadmissible against petitioner and was to be disregarded in determining petitioner's guilt or innocence. The Supreme

Court of the United States held that because of the substantial risk that the jury, in spite of contrary instructions would consider the incriminating statements in determining petitioner's guilt, admission of the co-defendant's confession in the joint trial violated petitioner's right of cross examination secured by the confrontation clause of the Sixth Amendment to the Constitution.

In the case at bar, the prejudice to defendant was if anything, worse than that in Bruton. In that case, the trial court at least cautioned the jury that the co-defendant's confession was inadmissible against defendant. Here this was not appropriate, and was not done. The hearsay statements of Prikas were openly and avowedly intended to be used against defendant.

This was no mere harmless error. The jury in this case acquitted defendant of the conspiracy count and only convicted him of possession after long and difficult deliberations (T762). Without the testimony by Prikas that Valdes informed him that Cuadros was the source of the drug, the result undoubtedly would have been different. The same is true of the statement, attributed to the absent Mr. Valdes, that Cuadros was there for protection. These two statements

were the most damaging evidence against Mr. Cuadros and undoubtedly were ultimately decisive in influencing the jury. We therefore believe that this violation of defendant's right to confront his accuser, requires reversal.

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CONCLUSION

THE JUDGMENT OF CONVICTION OF COUNT TWO
OF THE INDICTMENT SHOULD BE REVERSED AND
THE INDICTMENT DISMISSED. IN THE
ALTERNATIVE, A NEW TRIAL SHOULD BE
ORDERED AS TO COUNT TWO OF THE INDICTMENT.

Respectfully Submitted,

FREDRIC LEWIS
Attorney for Defendant-Appellant
30 Vesey Street, 11th Floor
New York, New York 10007
(212) 349-7300

COPY RECEIVED
ROBERT B. F. [unclear]
JUN 3 1977
U.S. ATTORNEY
SO. DIST. OF N.Y.

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